

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MUTUAL OF ENUMCLAW, a Washington  
domestic insurer, individually  
and as assignee of Larry and  
Anita Clark, husband and wife,

Plaintiff,

v.

CORNHUSKER CASUALTY INSURANCE  
COMPANY, a foreign insurer,

Defendant.

No. CV-07-3101-FVS

ORDER GRANTING DEFENDANT'S  
MOTION TO EXCLUDE EXPERT  
WITNESSES, DENYING PLAINTIFF'S  
MOTION FOR EXTENSION OF TIME  
TO FILE DISPOSITIVE MOTIONS,  
AND STRIKING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

**THIS MATTER** came before the Court for a telephonic hearing on Defendant's request for an order excluding expert witnesses identified by Plaintiff two days after the discovery cut-off deadline (Ct. Rec. 43) and Plaintiff's request for an extension of the dispositive motion deadline (Ct. Rec. 54). Plaintiff is represented by Brad E. Smith, and Defendant is represented by A. Richard Dykstra and Stephanie L. Grassia.

**BACKGROUND**

Larry and Anita Clark ("the Clarks") operate an orchard/farm and trucking business in Yakima, Washington. On October 17, 2003, Melvin McCormick, an employee of the Clarks, was involved in a motor vehicle collision with John and Nancy Green ("the Greens") while driving a

1 semi-truck owned and operated by the Clarks in their businesses.  
2 Complaint ¶¶ 2.2-2.3. The Greens filed a complaint against the  
3 Clarks, and others, for personal injuries they sustained in the  
4 collision. Complaint ¶ 2.4.

5 The Clarks were insured for liability coverage under a Cornhusker  
6 business auto policy in the amount of one-million dollars. The Clarks  
7 additionally had business auto liability coverage in the amount of  
8 \$500,000 under an Enumclaw policy. Complaint ¶ 2.5. Both Enumclaw  
9 and Cornhusker accepted the defense of the Clarks and McCormick  
10 without reservation of rights. Complaint ¶ 2.6.

11 Cornhusker subsequently identified a potential coverage defense  
12 but notified the Clarks that it would not raise any such coverage  
13 defense against them. Complaint ¶¶ 2.7-2.8. However, at a scheduled  
14 mediation of the Greens' case, Cornhusker notified representatives of  
15 Enumclaw of the purported coverage defense and indicated it would only  
16 contribute \$200,000 toward the settlement of the case. Complaint ¶  
17 2.10.

18 The Greens' case did not settle at mediation. The Greens,  
19 however, later agreed to settle the matter with Enumclaw. As part of  
20 the settlement agreement, Enumclaw obtained an assignment of all of  
21 the Clarks' claims against Cornhusker. Complaint ¶ 2.15.

22 Enumclaw, as the Clarks' assignees, brought the instant action  
23 alleging Cornhusker breached its contract to indemnify the Clarks,  
24 violated its duty of good faith and fair dealings to the Clarks, and  
25 violated the Washington State Consumer Protection Act. Complaint ¶¶  
26 3.1-5.5. Enumclaw additionally requests that the Court declare

1 Enumclaw is entitled to contribution/indemnification from Cornhusker  
2 for two-thirds of the settlement amount based upon the proportional  
3 limits of liability under their primary liability policies. Complaint  
4 ¶ 6.7.

5 The amended scheduling order, filed October 23, 2008, set the  
6 pretrial conference in this matter for January 6, 2009, and the trial  
7 for January 26, 2009. (Ct. Rec. 53). At the time the Court filed the  
8 amended scheduling order, the dates for completing discovery and for  
9 filing dispositive motions had passed. The Court's original  
10 scheduling order, filed April 23, 2008, provided for a discovery cut-  
11 off date of September 29, 2008, and a dispositive motion deadline of  
12 October 6, 2008. (Ct. Rec. 18 ¶¶ 2-3).

### 13 DISCUSSION

#### 14 I. Exclude Expert Witnesses

15 On October 6, 2008, Defendant moved the Court for an order  
16 excluding the expert witnesses identified by Plaintiff two days after  
17 the discovery cut-off date, Jerry Searles, M. Elizabeth Roche, and  
18 Kevin Hillyer. (Ct. Rec. 43). Defendant asserts that this was the  
19 first time Plaintiff revealed it intended to call an expert to  
20 testify, Jerry Searles was not listed on Plaintiff's initial  
21 disclosures pursuant to Fed. R. Civ. P. 26(a)(1), and Plaintiff failed  
22 to produce written reports and other information required by Fed. R.  
23 Civ. P. 26(a)(2) that would demonstrate that the proposed expert  
24 testimony is relevant and reliable. (Ct. Rec. 44 at 1-2). Defendant  
25 further contends that since Plaintiff's expert disclosure occurred  
26 after the discovery cut-off, it provided Defendant no opportunity to

1 discover and challenge the specific substance of each expert's  
2 opinion. (Ct. Rec. 44 at 3-4).

3 Defendant asks the Court to exclude any expert testimony offered  
4 by Jerry Searles, M. Elizabeth Roche, and Kevin Hillyer because  
5 Plaintiff did not submit expert witness reports for the individuals or  
6 provide adequate information to enable Defendant to formulate a  
7 *Daubert* motion. Pursuant to *Daubert*, the party offering the expert  
8 testimony has the burden of proving the proposed testimony is  
9 admissible. Defendant contends that without expert reports, Plaintiff  
10 is not able to demonstrate that the proposed expert testimony  
11 satisfies *Daubert* and is both relevant and reliable. Defendant also  
12 asserts that identification of the expert witnesses after the  
13 discovery cut-off is prejudicial. Because discovery closed prior to  
14 the identification of the expert witnesses, Defendant indicates it was  
15 not able to depose the witnesses to explore their opinions and  
16 qualifications.

17 Plaintiff responds that although the Court's initial scheduling  
18 order set a discovery deadline, it did not specifically state a  
19 deadline for the disclosure of expert witnesses. (Ct. Rec. 57 at 7;  
20 Ct. Rec. 18). However, Fed. R. Civ. P. 26(a)(2)(C) provides that the  
21 deadline to disclose expert testimony, absent a stipulation or a court  
22 order, is "at least 90 days before the date set for trial." Pursuant  
23 to this rule, expert witness disclosure should have occurred in this  
24 case no later than the last week of October. Plaintiff thus argues  
25 that the disclosure of the expert witnesses was not necessarily late.  
26 Nevertheless, Defendant claims that, as of October 31, 2008, Rule

1 26(a)(2) reports of Plaintiff's belatedly named experts had still not  
2 been produced. (Ct. Rec. 59).

3 Plaintiff further contends that facts and information necessary  
4 to determine whether an expert witness would be needed in this matter  
5 was not available until the primary representatives of both companies  
6 had been deposed in September of 2008. As such, Plaintiff argues that  
7 the need for experts was not reasonably ascertainable until recently.  
8 (Ct. Rec. 57 at 8). With respect to the lack of expert witness  
9 reports, Plaintiff asserts that a report pursuant to Fed. R. Civ. P.  
10 26(a)(2) could not be generated until the expert had an adequate  
11 opportunity to review documents and the deposition transcripts of key  
12 parties and witnesses, a process that takes a great deal of time and  
13 one which could not commence until the completion of the depositions  
14 of the primary representatives of both companies in September of 2008.  
15 (Ct. Rec. 57 at 11). Plaintiff claims that expert witness testimony  
16 is necessary in this case to assist the trier of fact in understanding  
17 insurance adjusting procedures and an insurance company's duties of  
18 good faith to its insured. (Ct. Rec. 57).

## 19 **II. Dispositive Motion Deadline**

20 On October 24, 2008, 18 days after the expiration of the  
21 dispositive motion deadline (Ct. Rec. 18 ¶ 3), Plaintiff moved the  
22 Court to extend the deadline for the parties to file dispositive  
23 motions. (Ct. Rec. 54). Plaintiff asserts that, pursuant to a  
24 written stipulation between the parties, the final deposition was  
25 completed in this matter on October 10, 2008. (Ct. Rec. 55 ¶ 3).  
26 Plaintiff thus indicates that, despite the discovery cut-off date,

1 discovery was not completed until October 10, 2008. *Id.* Although not  
2 entirely clear from Plaintiff's motion, it appears that Plaintiff is  
3 arguing that the delay in completing discovery led to Plaintiff's  
4 inability to timely file a motion for summary judgment. (Ct. Rec. 55  
5 ¶¶ 3-5). Plaintiff, however, does not provide rationale for its  
6 failure to request an extension at a time prior to the expiration of  
7 the deadline. Plaintiff further fails to specifically assert how the  
8 delay in discovery prevented Plaintiff from timely filing a motion for  
9 partial summary judgment on its first and fourth causes of action.  
10 Plaintiff simply asserts that it would be in the interest of justice  
11 and beneficial to the parties through a shortened trial (reduction of  
12 issues to be decided by the Court at trial) for the Court to allow  
13 Plaintiff to present its motion for partial summary judgment. (Ct.  
14 Rec. 55 ¶¶ 6-7).

15 Defendant responds that there exists no good cause for  
16 Plaintiff's requested extension. (Ct. Rec. 61). The delay of the  
17 discovery process of which Plaintiff complains is a result of  
18 Plaintiff's actions. Defendant claims it is in no way responsible for  
19 any delay in this matter. (Ct. Rec. 61). Although Defendant agreed  
20 to accommodate Plaintiff's counsel by allowing depositions after the  
21 discovery deadline, it did not agree to any other extensions of the  
22 case deadlines. (Ct. Rec. 61 at 5-6).

23 Defendant contends that "good cause" does not exist for an  
24 extension where a party's predicament results from its own inaction.  
25 (Ct. Rec. 61 at 7). In *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d  
26 604, 610 (9th Cir. 1992), the Ninth Circuit held that "good cause" did

1 not exist where the moving party's failure to timely request a  
2 pretrial scheduling order modification resulted from the party's own  
3 inaction and where "the burden was upon [the party] to prosecute his  
4 case properly." "[T]he focus of the inquiry is upon the moving  
5 party's reasons for seeking modification. . . . If that party was not  
6 diligent, the inquiry should end." *Id.* at 609 (citations omitted).

7 As pointed out by Defendant, Plaintiff's only excuse for  
8 requesting an extension is because it was not possible to complete  
9 discovery until just recently. However, a lack of diligence on the  
10 part of Plaintiff's counsel caused the delays in discovery. Plaintiff  
11 is thus responsible for its own failure to prosecute this case and  
12 should not now be granted an extension to file a dispositive motion  
13 based on that lack of diligence.

### 14 **III. Plaintiff's Motion for Partial Summary Judgment**

15 On November 12, 2008, Plaintiff filed a motion for partial  
16 summary judgment. (Ct. Rec. 64). In addition to being submitted over  
17 a month after the dispositive motion deadline, the draft motion is  
18 unfinished and otherwise deficient.

### 19 **CONCLUSION**

20 As this Court's scheduling order provides, a scheduling order may  
21 be modified only upon a showing of good cause. Fed. R. Civ. P. 16(b).  
22 At a minimum, this requires a showing that the deadline could not be  
23 met despite the diligence of the party seeking the modification. *See*  
24 *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th  
25 Cir. 2002). The scheduling order will not be amended absent a showing  
26 of good cause.

1 Plaintiff's counsel has failed to establish a sufficient basis  
2 for its late disclosure of experts and for its untimely request for a  
3 modification of the scheduling order. As indicated above, good cause  
4 does not exist where the moving party's failure to timely request a  
5 pretrial scheduling order modification resulted from the party's own  
6 inaction and where the burden was upon that party to prosecute its own  
7 case properly. The rationale provided by Plaintiff's counsel fails to  
8 demonstrate good cause for amending the Court's current scheduling  
9 order. Accordingly, **IT IS HEREBY ORDERED:**

10 1. Defendant's motion to exclude expert witnesses (**Ct. Rec. 43**)  
11 is **GRANTED**.

12 2. Plaintiff's motion for extension of time to file and hear  
13 summary judgment motions (**Ct. Rec. 54**) is **DENIED**.

14 3. Plaintiff's draft motion for partial summary judgment (**Ct.**  
15 **Rec. 64**) is **STRICKEN**.

16 **IT IS SO ORDERED.** The District Court Executive is hereby  
17 directed to enter this order and furnish copies to counsel.

18 **DATED** this 17th day of November, 2008.

19 S/Fred Van Sickle  
20 Fred Van Sickle  
21 Senior United States District Judge  
22  
23  
24  
25  
26